IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 3.7.2007

CORAM

THE HON'BLE MR.JUSTICE P.D.DINAKARAN
AND
THE HON'BLE MR.JUSTICE P.P.S.JANARTHANA RAJA

T.C.(A).No.242 of 2004

The Commissioner of Income Tax
Tamil Nadu-I, Madras. .. Appellant

Vs.

M/s.Viswas Footwear Company
Limited, A-2 III Phase Guindy
Industrial Estate, Chennai. .. Respondent

Appeal under Section 260A of the Income Tax Act, 1961 against the order of the Income Tax Appellate Tribunal, Madras 'D' Bench dated 21.7.2003 in ITA No.1987/Mds/2002 for the assessment year 1996-97.
Against the order of the Commissioner of Income Tax (Appeals) III Chennai dated 3.10.2002 made in I.T.A.No.67/2002-03/A.III G.I.No.PA No.422-V the year of Assessment 1996-97.
Against the Deputy Commissioner of Income Tax Company Circle III (4) Chennai dated 14.3.2002 G.I.No.422 V Assessment Year 1996-97.

For Appellant : Mrs.Pushya Sitaraman, Sr.S.C.(IT)

For Respondent : Mr.T.N.Seetharaman

WEB COPY

J U D G M E N T

(Delivered by P.D. DINAKARAN, J.)

The vexed substantial question of law, as raised by the Revenue, arises for consideration is,

> "Whether on the facts and in the circumstances of the case, the Appellate Tribunal was right in holding that deduction under section 80HHC shall be granted before setoff of the unabsorbed depreciation, unabsorbed business loss and

https://hcservices.ecourts.gov.in/hcservices/

unabsorbed investment allowance of the earlier years before grant of depreciation ?"

under the following facts and circumstances of the case.

2.1. The relevant assessment year is 1996-97. The assessee is an exporter of leather footwear. Originally, a 'Nil' return of income was filed by the assessee and the assessment was completed under Section 143(3) of the Income Tax Act, 1961 (in short 'the Act') on a total income of Rs.3,18,715/-, which was reduced to 'nil' after giving setoff of the carried forward loss for the assessment year 1993-94. Later, finding that the assessee has claimed excess deduction resulting in escapement of income, assessment was reopened by issuing notice under Section 148 of the Act. In response to this, a return of income was filed on 12.6.2001 and the assessing officer, by his order dated 14.3.2002, held that if the assessee has suffered loss under any other business or has carried forward the business loss, unabsorbed depreciation, etc., deduction under section 80HHC, though worked out on profit of the year, would be restricted to gross total income and hence, the assessee is not entitled to any relief. The said view of the assessing officer was also, on appeal by the assessee, confirmed by the Commissioner of Income-tax (Appeals), by his order dated 3.10.2002.

2.2. Aggrieved by the same, the assessee went on further appeal before the Appellate Tribunal and the Tribunal, by order dated 21.7.2003, after considering the provisions of section 80 HHC(3) of the Act and various decisions of this Court, held the issue in favour of the assessee holding that the deduction under section 80HHC should be granted before setting off the unabsorbed depreciation, unabsorbed business loss and unabsorbed investment allowance of the earlier years. Hence, the present appeal by the Revenue raising the substantial question of law, referred to above.

3. Heard both sides.

4.1. When an identical issue came up for consideration before this Court in Asvini Cold Storage P. Ltd. v. Commissioner of Income-tax [(2007) 290 I.T.R. 183], a Division Bench of this Court, while rejecting the case of the assessee therein, who placed reliance on the decision of the Bombay High Court in Commissioner of Income-tax v. Shirke Construction Equipments Ltd. [(2000) 246 I.T.R. 429 (Bom.)], followed the decision of the Apex Court in IPCA Laboratory Ltd. v. Deputy Commissioner of Income-tax [(2004) 266 I.T.R. 521 (SC)], and held as hereunder:-

" ... Section 80 HHC of the Income-tax Act, 1961,

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

provides for deduction of profits from the gross total income. Sub-section (3) is a machinery provision which lays down the manner of circulating the profits which constitute deduction under section 80 HHC(1). Consequently, section 80 HHC(3) aids in the working of the deduction under section 80 HHC (1). Considering the fact that section 80HHC is a section which comes under Chapter VI-A providing for special deduction in gross total income, necessarily, the computation for deduction has to be in accordance with the total income computed in a manner provided fro under section 80AB. It is relevant to note that section 80A deals with deduction to be made under Chapter VI-A in computing the total income. It may also be noted that section 80A(2) lays down that the aggregate amount of the income under Chapter VI-A shall not exceed the gross total income of the assessee. Read in the context of section 80A and section 80AB, the scheme of deduction under section 80HHC has to be computed out of the income from profits and gains of business in accordance with the provisions of the Act, as stated so under section 80AB.

... Section 80AB starts with the words "Where any deduction is required to be made or allowed under any section included in this Chapter, ... notwithstanding anything contained in that section, for the purpose of computing the deduction under that section, the amount of income of that nature as computed in accordance with the provisions of this Act, (before making any deduction under this Chapter), shall alone be deemed to be the amount of income of that nature which is derived or received by the assessee and which is included in his gross total income". It may be seen that the provisions of section 80AB contemplate that the gross total income has first to be computed in accordance with the provisions of the Act. When it comes to a deduction, section 80AB further provides that for the purpose of deduction under any of the sections in Chapter VI-A, the amount of income of that nature has to be computed in accordance with the provisions of the Act, which means, necessarily for the purpose of deduction, the income of that nature computed for deduction must have a working in accordance with the provisions of this Act. If that be so, income from profits and gains of business must necessarily conform to the provisions in Part D, including set off and carry forward."

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

4.2. While holding as above, the Division Bench in the above case held that the unabsorbed depreciation and unabsorbed investment allowance of earlier years should be set off while computing the profits of business for the purpose of determining the relief under section 80 HHC.

4.3. The view taken by this Court in the case of Asvini Cold Storage, referred supra, was subsequently followed by this Court in an unreported case in T.C.No.62 of 2004 (between Commissioner of Income Tax-III v. M/s.Sharon Vaneers P. Ltd.), wherein this Court by order dated 26.2.2007 held as follows:-

> 6. It is not in dispute that section 80HHC of the Act, which provides for deduction in respect of profits retained for export business, has been incorporated in the Income-tax Act, 1961, with a view to providing incentive for earning foreign exchange. A plain reading of section 80HHC makes it clear that in arriving at profits earned from export of both self manufactured goods and trading goods, the profits and losses in both trades have to be taken into consideration. If, after such adjustments, there is a positive profit the assessee would be entitled to deduction under section 80HHC (1) of the Act and if there is a loss the assessee would not be entitled to deduction. In arriving at the figure of positive profit, both the profits and the losses will have to be considered. If the net figure is a positive profit then the assessee will be entitled to deduction and if the net figure is a loss then the assessee will not be entitled to deduction. A plain reading of sub-section (3)(c) shows that "profits from such exports" has to be profits of exports of self-manufactured goods plus profits of exports of trading goods. The opening words "profit derived from such exports" together with the word "and" clearly indicate that the profits have to be calculated by counting both the exports. Deduction can be permitted under section 80HHC(1) only if there is a positive profit in the exports of both self-manufactured goods as well as trading goods. If there is a loss in either of the two, then the loss has to be taken into account for the purposes of computing the profits. On the other hand, the Section 80AB of the Act, which is also in Chapter VI-A, starting with the words "where any deduction is required to be made or allowed under any section of this Chapter" would include section 80HHC also. Further, section 80AB of the Act provides that "notwithstanding anything contained in that section". Thus section 80AB of the Act has been

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

given an overriding effect over all other sections in Chapter VI-A. But, section 80HHC does not provide that its provisions are to prevail over section 80AB of the Act or over any other provision of the Act. Section 80HHC of the Act would thus be governed by section 80AB of the Act. [vide: IPCA Laboratory Ltd. v. Deputy Commissioner of Income-tax, 266 ITR (SC) 521].

7. In this view of the matter, we are of the view that it is not correct to say that section 80HHC of the Act is a self-contained provision and section 80 AB of the Act cannot be applied to section 80 HHC of the Act. In other words, section 80AB of the Act will prevail over any other provision in Chapter VIA of the Act and Section 80HHC of the Act would thus be governed by section 80AB of the Act. We therefore hold that the unabsorbed business losses, unabsorbed depreciation, etc. should be taken into account while computing income for the purpose of deduction under section 80HHC of the Act. The Appellate Tribunal is not correct in holding that the unabsorbed depreciation, unabsorbed business loss and unabsorbed investment allowance of earlier years cannot be deducted before granting deduction under section 80 HHC of the Act and that the provisions of section 80AB of the Act cannot be applied while determining the business profits under section 80HHC."

4.4. To both the above decisions of this Court, viz., Asvini Cold Storage P. Ltd. v. Commissioner of Income-tax [(2007) 290 I.T.R. 183] and T.C.No.62 of 2004 (between Commissioner of Income Tax-III v. M/s.Sharon Vaneers P. Ltd.), one of us was a party (P.D.DINAKARAN, J.).

5.1. That apart, the view taken by the Bombay High Court in Commissioner of Income-tax v. Shirke Construction Equipments Ltd. [(2000) 246 I.T.R. 429 (Bom.)], which is relied upon by the assessee in the case of Asvini Cold Storage and in the case of Sharon Vaneers P. Ltd., referred supra, has now been reversed by the Apex Court in the recent decision reported in [(2007) 291 I.T.R. 380 (SC)], wherein the Apex Court has held as follows:-

".. Section 80AB of the Income-tax Act, 1961, specifying that profits are those as determined for the purpose of the Act, will apply for determining profits from export business for the purposes of the deduction under section 80 HHC.

.. In determining business profits for the deduction

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

under section 80 HHC, the unabsorbed business losses of earlier years under section 72 should be set off."

6. Under such circumstances, since the law on the point is well settled, as fortified by the decision of the Apex Court in Commissioner of Income-tax v. Shirke Construction Equipment Ltd. [(2007) 291 I.T.R. 380 (SC)] referred supra, we answer the substantial question of law raised by the Revenue in this appeal, in the negative, in favour of the Revenue and against the assessee. The tax case appeal is, accordingly, allowed. No costs.

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

sra

To

1.The Assistant Registrar,
Income Tax Appellate Tribunal
"D" Bench, Madras.

2.The Secretary, Central Board
of Direct Taxes, New Delhi.

3.The Commissioner of Income-
Tax (Appeals), Chennai.

4.The Deputy Commr. Of Income-tax,
Company Circle-III(4), Chennai.

5.The Assistant Registrar Tax Appellate Tribunal
IIIrd Floor Rajaji Bhavan,Besant Nagar,Madras -90

+1cc to Mr.Pushya Sitaraman, Senior Standing Counsel Income Tax Department SR 39875

AKR (CO)
km/19.7.

WEB COPY
https://hcservices.ecourts.gov.in/hcservices/